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IN THE

# Supreme Court of the United States

October Term, 1963.

No. 276.

EASTERN AIR LINES, INC.;
GENERAL MOTORS CORPORATION and
LOCKHEED AIRCRAFT CORPORATION,

*Petitioners,*

*v.*

DOROTHY WEINSTEIN, Executrix, etc.,
MARY B. GRICE, Executrix, etc.,
DIANE BRAFF, Admx., etc.,
THELMA P. FREEMAN, Executrix, et al., etc.,
EDNA E. LONG, Admx., et al., etc.,
ATTILIO E. ABATE, Admr., etc.,
JOSEPH THOMPSON, JR., Admr., etc.,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

## BRIEF FOR RESPONDENTS IN OPPOSITION.

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARVIN I. BARISH,
FREEDMAN, LANDY AND LORRY,
1415 Walnut Street,
Philadelphia 2, Pennsylvania,
*Attorneys for Respondents.*

International, 711 So. 50th St., Phila., Pa. 19143

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OCTOBER TERM, 1963.

No.

EASTERN AIR LINES, INC.,
GENERAL MOTORS CORPORATION AND
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*Petitioners,*

*v.*

DOROTHY WEINSTEIN, EXECUTRIX, ETC.,
MARY B. GRICE, EXECUTRIX, ETC.,
DIANE BRAFF, ADMX., ETC.,
THELMA P. FREEMAN, EXECUTRIX, ET AL., ETC.,
EDNA E. LONG, ADMX., ET AL., ETC.,
ATTILIO E. ALATE, ADMR., ETC.,
JOSEPH THOMPSON, JR., ADMR., ETC.,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINIONS BELOW

The opinion of the District Court (Appendix A, Petitioners' Brief) is reported sub nom. as *Weinstein v. Eastern Air Lines, Inc.* at 206 F. Supp. 430 (E. D. Pa., 1962). The opinion of the Court of Appeals for the Third Circuit reversing in part and affirming in part, (Appendix B, page 9(a) of Petitioners' Brief) is reported at 316 F. 2d 758 (April 26, 1963).

## JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

## QUESTIONS PRESENTED.

I. The decision of the court below upholding the right to sue in admiralty for injuries and deaths resulting from the crash of an airplane in navigable waters conforms with the established principles of tort jurisdiction, and is not in conflict with decisions of other appellate courts.

II. Tort jurisdiction in admiralty encompasses a right to recover for a breach of the warranty of fitness.

## STATEMENT OF THE CASE.

On October 4, 1960, a Lockheed Electra airplane took off from the Logan International Airport in Boston, Massachusetts, en route to Philadelphia, Pennsylvania. Shortly thereafter it crashed into the navigable waters of Boston Harbor as the result of which most of the passengers and crew members lost their lives. The survivors, in addition to suffering injury from the impact, were subjected to injury and exposure extricating themselves from the submerged aircraft and being rescued from the water.

## REASONS WHY THE PETITION SHOULD BE DENIED.

### The Decision of the Court Below Upholding the Right to Sue in Admiralty for Injuries and Deaths Resulting From a Crash of an Airplane in Navigable Waters Conforms With the Established Principles of Tort Jurisdiction and Is Not in Conflict With Decisions of Other Appellate Courts.

*A. The Decision of the Court Below Affirms the Traditional and Established Locality Test of Tort Jurisdiction in Admiralty.*

Since the adoption of the Constitution ample opportunity has been presented for the interpretation and construction of Article III, which provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." As the result, the general limits of admiralty jurisdiction have been definitively fixed from time to time by this court.

In conferring upon the United States courts "all cases of admiralty and maritime jurisdiction" with no limitation of that grant except that contained in the very definition of the words, the founding fathers indicated the broad scope of the jurisdictional grant intended, and manifested the first clear extension of admiralty jurisdiction.

In *De Lovio v. Boit*, 7 Fed. Cas. 418, 419, 432, 441, 444 (No. 3776) (C. C. D. Mass., 1815), a polestar in the firmament of judicial decisions, Mr. Justice Story traced the history of admiralty jurisdiction in England before the adoption of the Constitution, and determined that the jurisdiction of that court, as delimited and narrowed by the Court of the King's Bench, had been rejected by our founding fathers. Instead, he ascribed sweeping terms to the constitutional scope of jurisdiction. At p. 441:

"What is the true interpretation of the clause 'all cases of admiralty and maritime jurisdiction?' If we examine the etymology, or received use, of the words 'admiralty' and 'maritime jurisdiction', we shall find, that they include *jurisdiction of all things done upon and relative to the sea*, or, in other words, all transactions and proceedings relative to commerce and navigation, *and to damages and injuries upon the sea*." (Emphasis supplied.)

At p. 44:

"On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of 'all civil cases of admiralty and maritime jurisdiction' to the courts of the United States comprehends all maritime contracts, torts and injuries. *The latter branch is necessarily bounded by locality*." (Emphasis supplied.)

His views were accepted by this Court in *Waring v. Clarke*, 46 U. S. 441 (1847) and *Philadelphia, Wilmington and Baltimore R. R. Co. v. Philadelphia and Havre de Grace Steam Tow Boat Co.*, 64 U. S. 209 (1860).

In *The Plymouth*, 70 U. S. (3 Wall.) 20, 37 (1865) the specifications of the locality jurisdiction of the Admiralty Court over torts were set forth:

". . . The wrong or injury complained of must have been committed wholly upon the high seas or navigable waters, or at least, the substance and consummation of the same must have taken place upon these waters."

Further:

"The jurisdiction of admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. *Every species of tort, how-*

> *ey or occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.*" (Emphasis supplied.)

*The Plymouth*, therefore, definitely announced locality as the sole test for jurisdiction in tort. On the other hand, in *Insurance Company v. Dunham*, 11 Wall. 1, 20 L. Ed. 90 (1871), this court held that the test for jurisdiction in contract is the nature of the subject matter involved. Accordingly, in construing the congressional grant of admiralty and maritime jurisdiction it was determined that this jurisdiction is comprised of two types of cases: (1) those involving acts committed on the high seas or other navigable waters; and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category jurisdiction is determined by the locality of the substance of the injury, while in the second category the subject matter is the primary determinative factor. See The Constitution of the United States, Analysis and Interpretation, U. S. Government Printing Office, p. 574 (1953).

The locality test has been unqualifiedly pronounced by this Court as the criterion for tort jurisdiction in admiralty. *Gabone, Dubuque, Dunleith & Minn. Packet Co. v. Rock Island Bridge*, 73 U. S. 213, 215 (1867); *Panama R. R. v. Napier Shipping Co.*, 166 U. S. 280 (1897).

In *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59-60 (1914), an attack was made upon the jurisdiction along the same lines as contended by petitioners. Despite the fact that the court avoided the issue, it strongly endorsed the locality test, stating:

> "This rule—that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of The Genesee Chief, 12 How. 443), of navigable waters for tide waters. Thus, in the case of the Philadelphia, Wilmington & Baltimore R. R. Co. v. The Philadelphia & Havre de Grace Steam Towboat

Co., 23 How. 209, 215, the court said: 'The jurisdiction of courts of admiralty in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality.' Again, in the case of The Plymouth, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: 'The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters. A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however, occurring and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.'

. . . . . "

Further, the Court deemed the contention that there must be some connection with a vessel in order to attain maritime jurisdiction "altogether too narrow," 234 U. S. at page 61.

Following *Imbrovek*, a number of Supreme Court decisions referred to locality as the sole test for jurisdiction *Industrial Comm. v. Nordenholt Corp.*, 259 U. S. 263 (1922); *Western Fuel v. Garcia*, 257 U. S. 233 (1921). This was likewise true with inferior courts. See *Keator v. Rock Plaster Mfg. Co.*, 256 F. 574 (S. D. N. Y., 1919); *Netherlands American S. N. Co. v. Gallagher*, 282 F. 171 (C. A. 2, 1922); *Port of New York Stevedoring Co. v. Castagna*, 280 F. 618, 623 (C. A. 2, 1922); *Bureo v. Southern Pacific Co.*,

59 F. 2d 407, 408 (C. A. 9, 1931). The generality of the language employed by the court, following *Imbrovek*, would of itself be sufficient to show that it regarded locality as the sole test for jurisdiction. However, it is not necessary to rely upon general statements. In *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476 (1922), the lower court asked the Supreme Court for instructions concerning admiralty jurisdiction in the case of a carpenter injured while at work on board a new vessel which was as yet incomplete, but which had been launched in navigable waters. Mr. Justice McReynolds summarily answered this question when he stated:

> "The general doctrine that . . . admiralty jurisdiction depends . . . in tort matters, upon the locality, has been so frequently asserted by this court that it must now be treated as settled."

The significance of this ruling is manifested by the fact that under all rules of jurisdiction in contract since Rohde was working on an unfinished ship which was not as yet a vessel, his employment was not maritime in nature, and therefore the only conceivable justification for maritime jurisdiction was the fact that the accident occurred upon the navigable waters.

In *Fireman's Fund Ins. Co. v. City of Monterey*, 6 F. 2d 893 (N. D. Cal., 1925), a wharf, which then was a non-maritime object for jurisdictional purposes, was caused to collapse. As a result, a large number of cases of canned sardines which were stored on the wharf were precipitated into the navigable waters of Monterey Bay. The Court ruled that this case was one of proper admiralty cognizance and in so doing stated:

> ". . . The general rule is that 'the test of jurisdiction in matters of tort is the locality.' Hughes, Admiralty (2d Ed.) Sec. 36. Here it is admitted that all the acts and omissions of respondent took place on land, since the wharf in relation to which they occurred

is considered in law as land. Hughes (2d Ed.) Sec. 198, and cases cited; The Plymouth, 70 U. S. (3 Wall.) 20, 18 L. Ed. 125. But, as no actual damage to the goods was inflicted until they were thrown or fell into the water, it is asserted that the locality of the injury, the Bay of Monterey, which admittedly is within the jurisdiction of a court of admiralty."

A similar ruling had been made in *The City of London*, 25 Fed. 835 (S. D. N. Y., 1885), wherein a wharf loaded with steel blooms gave way, throwing the blooms into the water. Jurisdiction of the admiralty court was attacked on the grounds that the negligence alleged was a tort committed upon the wharf. It was held there that the admiralty did have jurisdiction as the consummation of the tort was in the water. *Cf. Vancouver S. S. Co. v. Rice*, 288 U. S. 445 (1933); *Ringie v. Port Huron Terminal Co.*, 295 U. S. 647 (1935).

In *Dyer v. Chesapeake Bay Ferry District*, 158 F. Supp. 408, 409 (E. D. Va., 1958), a passenger on a ferry that was sailing in navigable waters was held to have a right to maintain an action in admiralty against a bus company for the alleged negligence of the bus company's operator in permitting the bus to roll against her after the bus had boarded the ferry. Obviously the bus was not a maritime object and the basis for jurisdiction was the locality of the tort.

In *50,000 Feet of Timber*, 9 Fed. Cas. 47 (4758) (D. Mass., 1871), salvage was allowed on rafts of timber found floating in Boston Harbor. In reaching this decision Judge Lowell remarked that it would be no defense "that the goods had been washed out to sea from shore by gale or flood or hail or dropped from a balloon." (Emphasis ours.) And in *Brock v. \$2,1[illegible]*, 72 F. Supp. 115 (E. D. N. Y., 1947), id. 78 F. Supp. 635 (1948), where a boatman recovered a wallet from a corpse floating in New York Harbor, the court sustained a libel in rem for salvage, stating that the test was whether it was a "moving thing sus-

ceptible of being lost and saved within the local jurisdiction of admiralty".

More recently this Court has reaffirmed the locality test in *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625, 628 (1959), and *Hess v. United States*, 361 U. S. 314 (1960), where these words were used. (p. 318 Footnote 7):

> "There can be no question but that Oregon would be required to apply maritime law if this was an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law. The Plymouth (Hough v. Western Transp. Co.) (U. S.) 3 Wall. 20, 35, 36."

Further support for the locality test can be gleaned from the Death on the High Seas Act cases involving airplanes. An action based upon the Death on the High Seas Act is properly brought in admiralty. 41 Stat. 537, 46 U. S. C. 761-768 (1920). While that Act affords admiralty jurisdiction in deaths resulting more than a marine league from shore, it is significant that it nowhere states that it is to apply to air travel. While it is now undisputed that the Death on the High Seas Act applies to deaths resulting from the crash of airplanes at sea, *National Air Lines v. Stiles*, 268 F. 2d 400 (C. A. 5, 1959), cert. denied, 361 U. S. 885, it was originally contended that there was no admiralty jurisdiction in such cases on the basis of non maritime object. In *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 86-87 (N. D. Cal., 1954), the Court dealt with this issue and determined that jurisdiction would apply by means of the locality test. In this regard the Court stated:

> "Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred. . . . Locality

has remained the sole test of admiralty tort jurisdiction despite recurring expressions of doubt whether or not the tort must also bear some relation to the operation of the vessel.

"In applying the locality test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception but where the impact of the act or omission produced such injury as to give rise to the cause of action (citing cases). Insofar as it appears from the complaint in this action the wrongful act charged to defendant produced no actionable injury until the aircraft plunged into the sea. The tort occurred upon the high seas within the admiralty jurisdiction. If it is assumed arguendo that the air space over the high seas is without the admiralty jurisdiction, this case is analogous to those in which persons or property are precipitated from the land into the sea as a result of a wrongful act or omission. In such cases, if there is no impact upon the person or property before they strike the water, it is recognized that the tort occurs upon the water within the admiralty jurisdiction."

See further *Blumenthal v. United States*, 189 F. Supp. 435, 445 (E. D. Pa., 1960), aff'd, 306 F. 2d 16 (1962); *cf. D'Aleman v. Pan American Airways*, 259 F. 2d 493, 496 (C. A. 5, 1959).

In *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 U. S. 36, (1943) this Court took cognizance of the locality test as follows (p. 40):

"It is true that the jurisdiction in admiralty in cases of tort or collision is in general limited to events occurring on navigable waters. . . ."

Then went on to say that Congress under the Jones Act, 41 Stat. 1007, Ch. 250, § 33, 46 U. S. C. § 688, had the power to enlarge the rights and remedies of a seaman, which

afforded O'Donnell the right to recover despite the fact he was injured on-shore.

The *O'Donnell* decision bespoke of a consistent trend in the expansion of jurisdictional concepts in admiralty. By legislation, as in the Jones Act and the Admiralty Extension Act, 52 Stat. 496, 46 U. S. C. § 479 (1948) which broadened the scope of jurisdiction to include certain amphibian torts, howbeit not eliminating locality as a standard. *Fematter v. City of Los Angeles*, 196 F. Supp. 89, 91 (S. D. Cal. 1961). And by the courts in acknowledging that a tort arising out of a maritime status or relation is cognizable by the maritime law whether it arises on sea or on land. *Strika v. Netherlands Ministry of Traffic*, 185 F. 2d 555 (C. A. 2, 1950), cert. den., 341 U. S. 904; *Gutierrez v. Waterman Steamship Corp.*, 373 U. S. 206 (1963). Surely this enlargement of jurisdiction did not diminish the effect of locality.

It is now well established that there are three bases of admiralty jurisdiction: (1) locality; (2) maritime contract; (3) maritime status or relation, and so long as any one of these jurisdictional tests are satisfied, the admiralty court has jurisdiction. The locality test applies irrespective of the nature of the origin of the wrong or injury, or of the maritime character of the instrument of injury, or of the relation borne by the wrong done to a vessel, so long as the substance of the injury occurs upon navigable waters. It is a simple, all-inclusive formula, free from the perplexities which have plagued jurisdiction over contracts where in each instance there is a necessity of deciding whether a maritime relation exists.

### B. *The Decision of the Court Below Is Not in Conflict With the Decision of Other Appellate Courts.*

In an effort to show a conflict exists between the various circuits, the petitioners have confused locality jurisdiction with the jurisdiction which admiralty exercises over

torts affecting parties in a maritime relation. Neither *Castillo v. Argonaut Trading Agency*, 186 F. Supp. 398 (S. D. N. Y., 1957), nor *Forgione v. United States*, 202 F. 2d 249 (C. A. 3, 1953), cert. denied, 345 U. S. 966, involved torts which were consummated upon navigable waters. Both cases deal with the arrest and imprisonment of crew members which took place on shore. In the *Castillo* case, the crew members were aliens whose wrongful imprisonment was alleged to have been caused by the officers and agents of the vessel as a result of a disagreement over conditions on board the vessel. The court held there was a direct relationship to the operation of the vessel and the cause to be within the admiralty jurisdiction. In effect the Court determined that the locality test of jurisdiction was too restrictive and not exclusive. In the *Forgione* case the Court was concerned with American seamen. It found that the arrest and imprisonment did not fall within the purview of the Jones Act, and inasmuch as the situs of the tort was on shore it was non-maritime and not within the admiralty jurisdiction. Whatever conflict might exist between these decisions does not relate to the jurisdiction of admiralty to adjudicate a cause which arises on navigable waters. Therefore, it can be fairly stated that this citation does not imply any opposition to the decision of the court below.

The conflict which the petitioners would attribute to the Ninth Circuit through *Campbell v. H. Hackfeld & Co.*, 125 F. 693 (1903) has no merit. That decision was specifically rejected by this Court in *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 at 57-62, and therefore has no authoritative vitality.

The sole remaining decision cited by petitioners in opposition is *McGinty v. City of New York*, 192 F. Supp. 866 (S. D. N. Y. 1961). This decision was reviewed by the court below. It will be noted that the maritime situs of this tort is questionable, footnote 13, Appendix B, p. 16a.

We submit, therefore, that the petitioners have failed to demonstrate a conflict exists between the decision of the court below and the Courts of Appeal of other Circuits.

*C. The Crash of an Airplane Upon Navigable Waters Has Essential Maritime Characteristics.*

It is well settled that where the origin of the tort is on shore but the sum and substance of the injury is upon navigable waters, it is within the admiralty jurisdiction. *Vancouver S. S. Co. v. Rice*, 288 U. S. 446, 448; *Hess Altmr. v. United States*, *supra*, p. 319; *Wilson v. Transocean Airlines*, *supra*, p. 92; *Lacey v. L. B. Wiggins Airways, Inc.*, 95 F. Supp. 916 (D. C. Mass., 1951); *Noel v. Airponents, Inc.* (D. N. J. 1958), 169 F. Supp. 348, 350; *Middleton v. United Aircraft Corp.* (D. C. N. Y.), 204 F. Supp. 856, 857.

The sum and substance of injury occurs in a plane crash, when it falls and sinks into the water, striking any surface craft and undersurface craft or other objects while it plunges to a point of temporary or permanent repose, depending upon such vagaries as the depth of the water, and the forces of wind, tide and current. The resulting plight involves personal injury, escape and rescue as distinct from a crash ashore as the liquid state of the water differs from solid earth. Depending upon the proximity of the site of the crash to shore the sunken plane may constitute an obstruction to maritime commerce. Goods which float away are the object of flotsam, and the plane and its contents the object of salvage. *Lukes Bros. Steamship Co., Inc. v. Elvina Boat No. 3*, 155, 5 Avi. 17314 (D. C. S. D. Cal., 1957); *Lombros Seaplane Base, Inc. v. The Batory*, 215 F. 2d 228, 232-233 (C. A. 2, 1954). See also, Gilmore and Black, Law of Admiralty (1957) at p. 459. The contract to remove the wreck unquestionably would be maritime in nature as is any contract to remove a structure menacing navigation. See D. M. *Picton & Co. v. Eastes*, 160 F. 2d 189 (C. A. 5, 1947), cert. den., 331 U. S. 859. If surface or below surface craft are struck by the falling plane principles of collision

would be called into play with possible recourse to limitation of liability, and, depending upon the nationality of the craft involved, conceivable problems of international law and treaties.

The mobile character of a vessel is shared by the airplane. It invariably travels over bodies of navigable waters in the course of transportation, and in intercontinental transit it does so for most of the passage. If the crash occurs beyond a marine league from shore the next of kin of the victims have access to the Admiralty Court under the Death on the High Seas Act. There is no justification for denying equal access because the crash occurs close to shore. Certainly, the substitution in such a case of the remedy of a State death statute for the ones under the federal statute does not affect admiralty jurisdiction. *Hess, Admr. v. United States*, 361 U. S. at p. 318.

Interstate and foreign commerce are common to these instrumentalities of transportation, and it serves the national interest to have disputes relative to such transportation adjudicated in the federal courts. Canfield, The Uniformity of Maritime Law, 24 Mich. L. Rev. 544, 555 (1926); Story's Commentaries on the Constitution, 614, 617-618. In the case of the crash of an airplane upon navigable waters this can best be done by a court of admiralty competent to apply uniform and flexible procedures and to adjudicate every phase of the litigation arising out of such an occurrence.

There has been no expression of any jurisdictional conflict in the policy of Congress towards these two types of commerce. The purpose of the Federal Aviation Act of 1958, 72 Stat. 737, et seq., 49 U. S. C. Secs. 1301-1542 was to establish a new federal agency with powers adequate to enable it to provide for the safe and effective use of navigable airspace by both civil and military carriers and to deal with such problems as the overcrowding of air space and the development of airport facilities. See 1958 U. S. Code Congressional and Administrative News 3741.

43. There is nothing in that legislation, or in its forerunner, the Air Commerce Act of 1926, 44 Stat. 568, et seq., 49 U. S. C. 171 et seq., to suggest an intention to delimit the constitutional grant of jurisdiction or to deny the existence of admiralty and maritime jurisdiction generally over aircraft actually navigating or at rest in navigable waters. *Chow v. Pan American Airways, Inc.* (S. D. N. Y.), 1941 AMC 483, 485.*

## TORT JURISDICTION IN ADMIRALTY ENCOMPASSES A RIGHT TO RECOVER FOR A BREACH OF THE WARRANTY OF FITNESS.

Should this Court grant certiorari to the petitioners, the jurisdiction of the courts of admiralty to adjudicate rights and obligations arising from implied warranties should be clarified.

The general maritime law has retained vitality by the judicial process of adopting rules which meet the requirements of a dynamic society in its commerce upon and over the seas. As the principles of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916), were construed to become a part of the general law of torts, maritime as well as common law by the court in *Sieracki v. Seas Shipping Co., Inc.*, 149 F. 2d 98, 99-100 (C. A. 3, 1945), affirmed 328 U. S. 85, and in *Dunn v. Wheeler Shipbuilding Corp.*, 86 F. Supp. 659, 660-661 (E. D. N. Y., 1949), due recognition should also be given to the development of that law as it relates to implied warranties.

Two defects in the present state of the law have become apparent. First, the difficulty of proving negligence in many cases where it exists under the *MacPherson* rule,

* It is significant to note that the international *Convention on the Territorial Sea and the Contiguous Zone*, adopted by the U. N. Conference on the Law of the Sea, April 29, 1958 (U. N. Doc. A/Conf. 13/L. 53) provides in Part I, Section I, Article 2 the following:

"The sovereignty of a coastal state extends to the air space over the territorial sea as well as to its bed and subsoil." Thus recognizing the necessity of identity of jurisdiction.

Secondly, the growing awareness that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer as the one best able to distribute the risk to the general public. Prosser, Torts, 506-511 (2d Ed. 1955); 2 Harper & James, Torts, § 28.16. These defects have been given remedy by enlightened courts in stripping the contractual trappings of privity from "warranty" action, thereby raising the rule of *MacPherson* to the level of strict tort liability. Thus has emerged a species of liability without regard to either elements of privity or negligence. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N. J. 358; 161 A. 2d 69 (1961); Annotation, 75 A. L. R. 2d 39. As is often the case, developments of the common law are often at first not clearly articulated. It was for the jurisdiction which spawned *MacPherson* to enunciate that breach of warranty is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article was within the reasonable contemplation of the manufacturer or vendor. *Goldberg v. Kollsman Instrument Co.*, 12 N. Y. 2d 432, 191 N. E. 2d 81, 8 Ave. Cas. 17629. (1963). The tortious character of breach of warranty has already been recognized in *Middleton v. United Aircraft Corporation*, 204 F. Supp. 856 (S. D. N. Y., 1960) in a proceeding under the Suits in Admiralty Act. We submit that in the context of an injury occurring in or upon navigable waters such implied warranty is justiciable in admiralty.

## CONCLUSION

Petitioners' application for writ of certiorari should be denied because: (1) the court below properly applied the traditional and established rule of the locality test of jurisdiction; (2) there is no conflict between the decision of the court below and that of any other appellate court; (3) the crash of an airplane in navigable waters is a matter of maritime concern; (4) the problems of interstate and

foreign commerce adherent in such a disaster are best handled by a federal court sitting in admiralty with the competence to dispose of every phase of the litigation which might arise from the maritime situs of the tort; (3) Congress has shown no disposition to question the constitutional grant of jurisdiction in Admiralty as it might affect aviation.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MARVIN J. BARISH,
FREEDMAN, LANDY AND LORRY,
*Attorneys for Respondents.*